

NO. 49359-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

PAUL BURKS,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable William C. Houser, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

| | |
|--|-----------|
| TABLE OF CONTENTS | i |
| TABLE OF AUTHORITIES | ii |
| ARGUMENT..... | 1 |
| I. The sentencing rules for domestic violence offenses did not apply to Mr. Burks’s conviction because he did not violate a provision of the no-contact order prohibiting him from going to Bierlein’s home, school, or workplace..... | 1 |
| II. The court’s to-convict instruction violated Mr. Burks’s right to due process by impermissibly lowering the state’s burden of proof..... | 6 |
| CONCLUSION | 6 |

TABLE OF AUTHORITIES

WASHINGTON CASES

| | |
|---|---------|
| <i>State v. Baker</i> , 194 Wn. App. 678, 378 P.3d 243 (2016)..... | 5 |
| <i>State v. Barbee</i> , 386 P.3d 729 (Wash. 2017), <i>as amended</i> (Jan. 26, 2017) | 4 |
| <i>State v. Hodgins</i> , 190 Wn. App. 437, 360 P.3d 850 (2015)..... | 2, 3, 4 |
| <i>State v. Kozey</i> , 183 Wn. App. 692, 334 P.3d 1170 (2014) | 2, 3 |
| <i>State v. McDonald</i> , 183 Wn. App. 272, 333 P.3d 451 (2014) | 2 |
| <i>State v. Trey M.</i> , 186 Wn.2d 884, 383 P.3d 474 (2016) | 3 |
| <i>State v. Wilson</i> , 170 Wn.2d 682, 244 P.3d 950 (2010)..... | 6 |

WASHINGTON STATUTES

| | |
|---------------------|---------------|
| RCW 10.99.020 | 1, 2, 3, 4, 5 |
| RCW 26.50.010 | 2, 3 |
| RCW 26.50.110 | 4 |
| RCW 9.94A.030..... | 2, 4, 5 |
| RCW 9.94A.525..... | 1, 4, 5 |

OTHER AUTHORITIES

| | |
|--|---|
| <i>Washington State Adult Sentencing Guidelines Manual</i> , 327 (2014)..... | 5 |
|--|---|

ARGUMENT

I. THE SENTENCING RULES FOR DOMESTIC VIOLENCE OFFENSES DID NOT APPLY TO MR. BURKS’S CONVICTION BECAUSE HE DID NOT VIOLATE A PROVISION OF THE NO-CONTACT ORDER PROHIBITING HIM FROM GOING TO BIERLEIN’S HOME, SCHOOL, OR WORKPLACE.

Mr. Burks was sentenced under the statutory scheme for domestic violence offenses at RCW 9.94A.525(21).

But the relevant definitions of “domestic violence offense” do not apply to Mr. Burks’s alleged conduct of either calling or texting Bierlien.

Rather, they encompass only:

Violation of the provisions of a restraining order, no-contact order, or protection order restraining or enjoining the person or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location...

RCW 10.99.020(5)(r).

Because the jury did not find that Mr. Burks had violated a provision of the no-contact order prohibiting him from going to or near Bierlein’s home, workplace, or school, he was not convicted of a “domestic violence offense” under RCW 9.94A.525(21).

Despite the plain language of RCW 10.99.020(5)(r), which only applies to violations of the provisions of relevant court orders involving going to the protected party’s workplace, school, etc., the state argues that

any violation of a no-contact order would qualify as a domestic violence offense for sentencing purposes. *See* Brief of Respondent, pp. 10-12 (citing *State v. Kozey*, 183 Wn. App. 692, 334 P.3d 1170 (2014); *State v. McDonald*, 183 Wn. App. 272, 333 P.3d 451 (2014); *State v. Hodgins*, 190 Wn. App. 437, 360 P.3d 850 (2015)).

First, *Kozey* and *McDonald* merely hold that an offender's conduct does not have meet the definitions at *both* RCW 26.50.010 *and* RCW 10.99.020 in order to qualify as a domestic violence offense under RCW 9.94A.030(20). *See Kozey*, 183 Wn. App. 692; *McDonald*, 183 Wn. App. at 277-279.

But Mr. Burks's alleged conduct does not qualify as an offense of domestic violence under *either* RCW 26.50.010 or RCW 10.99.020. In fact, the *Kozey* and *McDonald* courts' analyses interpret the language of RCW 9.94A.030(20), whereas the analysis of Mr. Burks's claim turns completely on the language of RCW 10.99.020(5)(r). The state's reliance on *Kozey* and *McDonald* is misplaced.

The state also argues that, because the list of offenses at RCW 10.99.020(5) is nonexclusive, any offense against a family or household member should qualify for the sentencing rules for domestic violence offenses. Brief of Respondent, pp. 8-9.

But the state ignores language in *Kozey* explicitly holding otherwise. *See Kozey*, 183 Wn. App. at 698-99.

In order to avoid rendering the long list of enumerated offenses at RCW 10.99.020(5) superfluous, the *Kozey* court clarified that RCW 10.99.020 defines a nonexclusive list of *per se* crimes of domestic violence for sentencing purposes and that RCW 26.50.010 “tells the court how to determine if a crime not on the list constitutes domestic violence.” *Id.* at 700-01.¹

No offenses involving violation of a no-contact order are included in the definition of domestic violence at RCW 26.50.010. Accordingly, Mr. Burks’s conviction does not qualify as a domestic violence offense unless it is included in the enumerated list at RCW 10.99.020(5). *Id.*

The only authority the state relies upon that is relevant to Mr. Burks’s claim is *Hodgins*. *Hodgins*, 190 Wn. App. 437. But this Court should decline to follow Division III’s holding in *Hodgins* because it is incorrect and harmful. *See State v. Trey M.*, 186 Wn.2d 884, 893, 383 P.3d 474 (2016) (precedent will be abandoned when it is incorrect and harmful).

¹ For example, the *Kozey* court notes, offenses such as third degree rape and child molestation are not on the enumerated list at RCW 10.99.020 but would fall under the definition of domestic violence at RCW 26.50.010. *Kozey*, 183 Wn. App. at 698-99.

Without any analysis or citation to authority, the *Hodgins* court concludes that the language at RCW 10.99.020(5)(r) requires that an offense is one of domestic violence for sentencing purposes as long as it involves violation of an order that in some way enjoins or restrains the accused from going within a specified distance of the protected party's home, workplace, etc. *Id.* at 447. This is so, according to *Hodgins*, even if the person is not actually convicted of violating those provisions.

This Court should reject the *Hodgins* court's interpretation of RCW 10.99.020(5)(r) because it would lead to absurd results. *See State v. Barbee*, 386 P.3d 729, 736 (Wash. 2017), *as amended* (Jan. 26, 2017) (courts must avoid interpreting statutes in a manner that yields absurd results).

Specifically, the *Hodgins* court's construction of the statute would make it impossible for a person convicted of felony violation of a no-contact order to be sentenced with an offender score of zero or one. This is because, in order to be convicted of the felony offense, a defendant must have at least two prior convictions for misdemeanor no-contact order violations. RCW 26.50.110(5). Under the sentencing scheme for domestic violence offenses, each of those prior misdemeanor convictions would add a point to the offender score as "repetitive" convictions. *See* RCW 9.94A.525(21); RCW 9.94A.030(42). Accordingly, if every felony

violation of a no-contact order conviction were subject to the sentencing rules for domestic violence offenses, that offense would never be sentenced with an offender score below two.

But the sentencing guidelines for felony violation of a no-contact order include a standard range for that offense when the offender has a score of zero or one. *Washington State Adult Sentencing Guidelines Manual*, 327 (2014).²

Mr. Burks's reading of RCW 10.99.020(5)(r) – under which only some convictions for felony violation of a no-contact order are sentenced as domestic violence offenses – harmonizes the relevant statutes.

At best, RCW 10.99.020(5)(r) is ambiguous as to which convictions for felony violation of a no-contact order should be sentenced as domestic violence offenses. Under the rule of lenity, any ambiguity must be resolved in Mr. Burks's favor. *See State v. Baker*, 194 Wn. App. 678, 684, 378 P.3d 243 (2016).

The court exceeded its authority by sentencing Mr. Burks with an offender score of six when the sentencing rules for domestic violence offenses did not apply to his case. RCW 9.94A.525(21), 9.94A.030(20), 10.99.020(5)(r); *State v. Wilson*, 170 Wn.2d 682, 688, 244 P.3d 950

² Available at http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2014.pdf

(2010). Mr. Burks's sentence must be vacated and his case remanded for resentencing with an offender score of one. *Wilson*, 170 Wn.2d at 688.

II. THE COURT'S TO-CONVICT INSTRUCTION VIOLATED MR. BURKS'S RIGHT TO DUE PROCESS BY IMPERMISSIBLY LOWERING THE STATE'S BURDEN OF PROOF.

Mr. Burks relies on the argument set forth in his Opening Brief.

CONCLUSION

For the reasons set forth above and in Mr. Burks's Opening Brief, the sentencing court exceeded its authority by calculating Mr. Burks's offender score under the rules for domestic violence offenses, which did not apply to his offense of conviction. Mr. Burks's case must be remanded for resentencing.

Respectfully submitted on February 22, 2017,



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on February 22, 2017.



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February 22, 2017 - 11:07 AM

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